No. 10-548

In the Supreme Court of the United States

KAISER EAGLE MOUNTAIN, INC., ET AL., PETITIONERS

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
TAMARA N. ROUNTREE
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the court of appeals erred in setting aside the Bureau of Land Management's decision regarding a land exchange and remanding for further administrative proceedings.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 9
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Baltimore Gas & Elec. Co. v. *NRDC*, 462 U.S. 87 (1983) 3
California Wilderness Coalition v. *United States Dep't of Energy*, No. 08-71074, 2011 WL 294087 (9th Cir. Feb. 1, 2011) 11
Dantran, Inc. v. *United States Dep't of Labor*, 171 F.3d 58 (1st Cir. 1999) 12
Desert Citizens Against Pollution v. *Bisson*, 231 F.3d 1172 (9th Cir. 2000) 6, 7, 10
Fisher v. *Bowen*, 869 F.2d 1055 (7th Cir. 1989) 13
Florida Power & Light Co. v. *Lorion*, 470 U.S. 729 (1985) 9
Friends of the Boundary Waters Wilderness v. *Dombeck*, 164 F.3d 1115 (8th Cir. 1999) 13
Friends of the Clearwater v. *Dombeck*, 222 F.3d 552 (9th Cir. 2000) 11
Glisson v. *United States Forest Serv.*, 138 F.3d 1181 (7th Cir.), cert. denied, 525 U.S. 1022 (1998) 13
Illinois Commerce Comm'n v. *ICC*, 848 F.2d 1246 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989) ... 13

Cases—Continued: Page

National Ass'n of Home Builders v. *Defenders of Wildlife*, 551 U.S. 644 (2007) 9, 12
Nevada v. *Department of Energy*, 457 F.3d 78 (D.C. Cir. 2006) 12
NLRB v. *American Geri-Care, Inc.*, 697 F.2d 56 (2d Cir. 1982), cert. denied, 461 U.S. 906 (1983) 13
Robertson v. *Methow Valley Citizens Council*, 490 U.S. 332 (1989) 3
Save Our Heritage, Inc. v. *FAA*, 269 F.3d 49 (1st Cir. 2001) 12
Shinseki v. *Sanders*, 129 S. Ct. 1696 (2009) 11
Sierra Club v. *Slater*, 120 F.3d 623 (6th Cir. 1997) 13
United States Telecom Ass'n v. *FCC*, 400 F.3d 29 (D.C. Cir. 2005) 12
United States v. *Williams*, 504 U.S. 36 (1992) 15
Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1978) 4

Statutes and regulations:

Administrative Procedure Act, 5 U.S.C. 706 9
Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 *et seq.* 1
43 U.S.C. 1716(a) 2
43 U.S.C. 1716(b) 2
43 U.S.C. 1731 2
National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq* 2
42 U.S.C. 4332(2)(C) 3
42 U.S.C. 4332(2)(C)(iii) 3

Regulations—Continued: Page

40 C.F.R.:
Pt. 1502 3
Section 1502.13 3
Section 1502.14(a) 3
Pt. 1508 3
43 C.F.R.:
Section 4.403 2
Section 4.410 2
Section 4.412(a) 2
Pt. 2200 2
Section 2200.0-5(k) 2
Section 2200.0-6(c) 2
Section 2200.0-6(f) 4
Section 2200.0-6(h) 3

Miscellaneous:

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 15

In the Supreme Court of the United States

No. 10-548

KAISER EAGLE MOUNTAIN, INC., ET AL., PETITIONERS

v.

NATIONAL PARKS & CONSERVATION ASSOCIATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-97) is reported at 606 F.3d 1058. The opinion of the district court (Pet. App. 98-137) is unreported.

JURISDICTION

The amended judgment of the court of appeals was entered on May 19, 2010, and a petition for rehearing was denied on July 30, 2010 (Pet. App. 275-279). A petition for a writ of certiorari was filed on October 22, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Land Policy and Management Act of 1976 (Management Act), 43 U.S.C. 1701 *et seq.*, autho-

rizes the Secretary of the Interior to "dispose[] of" "[a] tract of public land or interests therein * * * by exchange" if the Secretary "determines that the public interest will be well served by making that exchange" in light of various factors identified in the statute. 43 U.S.C. 1716(a). The Secretary delegated his responsibilities under the Management Act to the Bureau of Land Management (BLM). 43 U.S.C. 1731. The Department of the Interior has promulgated regulations governing BLM's review and analysis of proposed land exchanges. See generally 43 C.F.R. Pt. 2200.

The Management Act provides that the values of lands exchanged "shall be equal, or if they are not equal, the values shall be equalized by the payment of money." 43 U.S.C. 1716(b). For the purpose of exchanges, land is valuated based on market value as determined by BLM through land appraisals. 43 C.F.R. 2200.0-6(c). The multipronged valuation process includes BLM's consideration of the "[h]ighest and best use" of the selected public lands. 43 C.F.R. 2200.0-5(k). Highest and best use is defined as "the most probable legal use of a property, based on market evidence as of the date of valuation, expressed in an appraiser's supported opinion." *Ibid.*

Parties aggrieved by a BLM decision on a proposed land exchange may appeal that decision to the Department of the Interior's Board of Land Appeals (Appeals Board). 43 C.F.R. 4.410. The administrative appellant must file with the Appeals Board a "statement of reasons" for the appeal and "written arguments or briefs." 43 C.F.R. 4.412(a). A decision of the Appeals Board constitutes final agency action. 43 C.F.R. 4.403.

b. Land exchanges governed by the Management Act are also subject to the requirements of the National

Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* See 43 C.F.R. 2200.0-6(h). NEPA requires that, whenever a federal agency proposes a "major Federal action[] significantly affecting the quality of the human environment," the agency must examine the reasonably foreseeable environmental effects of the proposed action and inform the public about its effects on the environment. 42 U.S.C. 4332(2)(C); 40 C.F.R. Pt. 1508; see *Baltimore Gas & Elec. Co.* v. *NRDC*, 462 U.S. 87, 97 (1983). In so doing, the agency must prepare a "detailed statement" of the environmental impact of the proposed action—an "environmental impact statement" (EIS)—the requirements of which are set out in the regulations implementing NEPA. 42 U.S.C. 4332(2)(C); 40 C.F.R. Pts. 1502, 1508. Those regulations provide, *inter alia*, that an EIS "shall briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action." 40 C.F.R. 1502.13. Although NEPA itself does not address or set forth any requirements governing the purpose-and-need statement, it does require that an EIS include "alternatives to the proposed action." 42 U.S.C. 4332(2)(C)(iii). The regulations require that an EIS "[r]igorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated." 40 C.F.R. 1502.14(a).

NEPA "does not mandate particular results, but simply prescribes the necessary process." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). NEPA's "mandate to the agencies is essentially procedural" and is designed "to insure a fully informed and well-considered decision" on the part of the fed-

eral agency. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978).

2. This case concerns a land exchange between BLM and petitioners Kaiser Eagle Mountain, Inc., and Mine Reclamation Corporation. Petitioners owned an iron ore mine in California and operated it from 1948 to 1983. Pet. App. 5. The mine area covered more than 5000 acres and included four large open pits. *Ibid.* The disturbed land contains large quantities of mine tailings and has not been reclaimed. *Ibid.* The United States owns a reversionary interest in some of the land used by petitioners in operating the mine. *Ibid.*

BLM manages several parcels of public land surrounding the former mine site. Pet. App. 5. In 1989, petitioners sought to acquire those parcels through a land exchange with BLM pursuant to the Management Act. *Ibid.* Petitioners proposed to acquire those parcels of federally owned land surrounding the mine site in order to construct a nonhazardous municipal-waste landfill. *Id.* at 5-6. Pursuant to the exchange (which was effectuated in 1999), BLM received a cash payment and 2846 acres of private land. *Ibid.* The acquired private lands consolidate public landholdings administered by BLM and place under federal management environmentally sensitive lands, including an area designated by the United States Fish and Wildlife Service as critical habitat for the threatened desert tortoise. Gov't Opening C.A. Br. 6. Under petitioners' proposal, all of the offered private lands will become part of the California Desert Conservation Area, pursuant to 43 C.F.R. 2200.0-6(f). Gov't Opening C.A. Br. 6. In return, BLM transferred to petitioners 3481 acres of fragmented parcels of mostly mountainous public land surrounding the open pits left over from petitioners' former mining oper-

ation; a grant of two rights-of-way; and the conveyance of the United States' reversionary interest to lands in the area of petitioners' former mining operation. *Ibid.*; Pet. App. 5-6.

In 1992, BLM and the County of Riverside (the lead State agency, under the California Environmental Quality Act) issued a joint federal Environmental Impact Statement/California State Environmental Impact Report (EIS/EIR), analyzing the proposed land exchange and landfill project. Gov't Opening C.A. Br. 7; Pet. App. 102. In January 1997, following a state court challenge to the joint document, the release of a new draft document, and four public hearings, BLM and the County of Riverside issued a final EIS/EIR and approved the proposed project. Gov't Opening C.A. Br. 8; Pet. App. 102-103. BLM's approval of the land exchange included its approval of an expert land appraisal for the public and private lands that were to be exchanged (the Yerke appraisal). Pet. App. 7-8, 103. On September 25, 1997, BLM issued a Record of Decision (ROD) approving the land exchange with petitioners. *Id.* at 8, 104. The private respondents in this Court (respondents), National Parks Conservation Association and Donna and Laurence Charpied, filed protests with BLM challenging the ROD and they subsequently appealed to the Appeals Board when BLM denied the protests. *Id.* at 8. In September 1999, the Appeals Board issued a written opinion affirming BLM's decision. *Id.* at 8, 138-202. In October 1999, the land exchange was effectuated by the filing of grant deeds with the County Recorder. *Id.* at 104.

3. a. In December 1999 and January 2000, respondents filed separate suits in the district court against BLM and the Department of the Interior, alleging viola-

tions of the Management Act and NEPA and seeking declaratory and injunctive relief. Pet. App. 8, 100. The district court consolidated the suits. *Id.* at 8. While the consolidated cases were pending, the Ninth Circuit issued its decision in *Desert Citizens Against Pollution* v. *Bisson*, 231 F.3d 1172, 1180-1187 (2000) (*Desert Citizens*), addressing, *inter alia*, the Management Act's requirements governing analysis of the highest and best uses of lands proposed for a land exchange. Respondents moved for summary judgment, relying on the decision in *Desert Citizens* to argue that BLM's appraisal was inadequate because the "highest and best use" analysis for the market-value determination did not consider a landfill as a potential use of the public lands chosen for exchange, and submitting their own new appraisal of the land. See Pet. App. 118, 302. In response, BLM retained an independent real estate appraisal expert to prepare a report (the Herzog report) that, among other things, conformed to the Uniform Appraisal Standards for Federal Land Acquisitions and complied with the requirements described in *Desert Citizens*. See *id.* at 301-334; *id.* at 19 n.5. BLM approved the Herzog report, formally added it as a supplement to the administrative record, and submitted it to the district court as an attachment to BLM's joint summary judgment motion with Kaiser. See *id.* at 301-334.

In 2005, the district court issued an unpublished opinion granting in part and denying in part the cross-motions for summary judgment. Pet. App. 98-137. The court rejected the government's contention that respondents had not administratively exhausted their Management Act claims concerning BLM's analysis of the highest and best use of the exchanged public lands, and did not expressly decide whether they had exhausted their

NEPA claims concerning BLM's purpose-and-need statement and range-of-alternatives analysis. *Id.* at 105-108. On the merits of the Management Act claims, the district court concluded that BLM's Yerke appraisal of the land at issue violated the Management Act and the Ninth Circuit's prescriptions in *Desert Citizens*, *supra*, by failing to consider a landfill as a potential highest and best use for the public lands selected for exchange. *Id.* at 117-120. In so finding, the court did not consider either respondents' appraisal or the Herzog report filed with the parties' summary judgment motions. On the merits of the NEPA claims, the court found that BLM erred by defining the purpose and need of the land exchange "so narrowly * * * that *only* the proposed land exchange and land interest grants could accomplish the agency's goals." *Id.* at 132-133. The court further concluded that, because the purpose-and-need statement was too narrow, BLM did not consider a reasonable range of alternatives for the proposal. *Id.* at 135. The district court remanded to BLM and set aside the land exchange, pending BLM's preparation of an EIS and ROD consistent with the court's order. *Id.* at 136-137.

b. The government and petitioners appealed, and respondents Donna and Laurence Charpied cross-appealed. A divided panel of the court of appeals issued a decision on November 11, 2009, and a revised decision on May 19, 2010, affirming in part, reversing in part, and remanding for further proceedings. Pet. App. 1-97.[1]

As to respondents' Management Act claims, the majority of the panel rejected the government's argument

[1] Citations to the court's decision are to the revised opinion issued on May 19, 2010, which is included in the appendix to the petition for a writ of certiorari.

that respondents failed to administratively exhaust their challenge to BLM's "highest and best use" analysis, finding that the Appeals Board received "sufficient notice" to allow the agency to respond to the issue. Pet. App. 12-15. On the merits, the majority found that BLM's initial "highest and best use" analysis should have examined the "reasonably probable use" of the exchanged lands as a landfill. *Id.* at 20. The majority declined to consider whether the Herzog report cured this deficiency because the report post-dated the challenged agency decision. *Id.* at 19 n.5.

With respect to respondents' NEPA claims, the majority did not address whether the challenges to BLM's purpose-and-need and range-of-alternatives analyses had been properly raised in and exhausted through the administrative process. On the merits of those claims, the panel majority held that the purpose-and-need statement in the EIS was deficient because three of the four goals identified therein "respond to [petitioners'] goals, not those of the BLM." Pet. App. 24; see *id.* at 23-29. The majority concluded that BLM's "narrowly drawn" purpose-and-need statement "necessarily and unreasonably constrain[ed] the possible range of alternatives" considered by BLM. *Id.* at 28. The majority further held that the EIS's analysis of atmospheric eutrophication was inadequate because it was presented in a "patchwork" manner that could not "serve as a 'reasonably thorough' discussion" of the issue. *Id.* at 31-33.

Judge Trott filed a separate opinion dissenting from the panel majority's. Pet. App. 35-97. Judge Trott would have held that the EIS's purpose-and-need statement, consideration of alternatives, and discussion of eutrophication satisfied the requirements of NEPA. *Id.* at 44-79. With respect to respondents' "highest and

best use" claims under the Management Act, Judge Trott would have held that respondents failed to administratively exhaust those claims, *id.* at 80-90, and that the Herzog report cured any inadequacies in BLM's initial "highest and best use" analysis, *id.* at 90-96.

ARGUMENT

Petitioners ask this Court to review the decision of the court of appeals to remand this case to BLM for further administrative proceedings after the court found violations of the Management Act and NEPA. Although the government agrees with petitioners that the court of appeals erred in remanding the case—as well as in finding violations of the Management Act and NEPA—further review by this Court is not warranted, because the court of appeals' decision is fact-bound and does not squarely conflict with any decision of this Court or of any other court of appeals.

Petitioners' primary contention (Pet. 18) is that the court of appeals' decision to remand to the agency to correct violations of the Management Act and NEPA was error because there is no "substantial prospect that the agency's decision will change as a result" of the remand. The Administrative Procedure Act (APA), 5 U.S.C. 706, admonishes that, when a court reviews agency action, "due account shall be taken of the rule of prejudicial error." Although a court ordinarily should remand to an agency when it determines that the administrative record does not support the agency action under review, *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985), under the prejudicial-error rule, a remand is not required if a perceived error "could have had no effect on the underlying agency action being challenged," *National Ass'n of Home Builders* v. *Defenders*

of Wildlife, 551 U.S. 644, 659 (2007) (*Home Builders*). Petitioners ask this Court to review the court of appeals' application of the prejudicial-error rule to the perceived violations of the Management Act and NEPA.[2]

1. Review by this Court of the court of appeals' decision to remand to BLM for correction of what the court viewed as a violation of the Management Act is not warranted, because the decision involves the fact-bound application of the proper legal standard. Petitioners contend (Pet. 19-24) that the APA's instruction that courts reviewing agency action take account of "the rule of prejudicial error" prohibits a court that finds error in an agency's action from remanding to the agency for further proceedings, if such a remand is likely to produce the same result. However, the court of appeals in this case did not identify anything in the administrative record underlying the agency decision under review that indicated a likelihood that BLM would have reached the same conclusion had it undertaken a "highest and best use" analysis in keeping with the requirements subsequently announced in *Desert Citizens Against Pollution* v. *Bisson*, 231 F.3d 1172, 1180-1187 (9th Cir. 2000) (*Desert Citizens*). It is true that the agency revisited its original "highest and best use" analysis after the decision in *Desert Citizens*—resulting in the Herzog report —but the court of appeals refused to consider that report because it "was not before either the BLM or the

---

[2] Petitioners do not seek review of the court of appeals' determination that respondents administratively exhausted their Management Act and NEPA claims. Nor do petitioners seek review of the merits determinations that BLM's final decision violated the Management Act and NEPA. Although the government disagrees with the court of appeals' resolution of those issues in various respects, those issues are not presented in the petition for a writ of certiorari.

Appeals Board" when they made the decisions under review. Pet. App. 19 n.5. Moreover, even if the court of appeals had considered the Herzog report in applying the prejudicial-error rule to evaluate the decision under review, the court determined that it was "hardly" clear that, in obtaining the report, the agency had "cured the Management Act deficiencies of the Yerke appraisal 'on a basis that could not be successfully challenged.'" Pet. App. 19 n.5 (quoting *Friends of the Clearwater* v. *Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000)). Thus, the court of appeals did not reject the principle advanced by petitioners that remand is not appropriate when it is clear that the outcome of the agency's action will not change. The court of appeals' fact-specific application of the prejudicial-error rule to this case does not merit review by this Court.[3]

Petitioners acknowledge (Pet. 21) that this Court "has not considered the circumstances in which supposed errors in EISs require vacating agency action and remanding for further proceedings," but rely (Pet. 20-24) on various court of appeals decisions, some of which involve review of EISs and some of which do not, in support of their argument.

---

[3] The Ninth Circuit recently held—relying on this Court's decision in *Shinseki* v. *Sanders*, 129 S. Ct. 1696 (2009)—that the party challenging agency action bears the burden of demonstrating the existence of prejudicial error. *California Wilderness Coalition* v. *United States Dep't of Energy*, No. 08-71074, 2011 WL 294087, at *10-*13 (Feb. 1, 2011). It is not clear in the instant case whether the court of appeals allocated that burden appropriately. But petitioners do not challenge the court of appeals' decision on that basis, and the court's conclusion that it could not determine whether the agency's final decision would have been the same absent the putative errors provides a sufficient basis for this Court to deny further review.

Based on the administrative record, those decisions looked to whether a particular agency error affected the agency decision under review. Those decisions therefore are consistent with this Court's statements in *Home Builders*, 551 U.S. at 659, that errors that "could have had no effect on the underlying agency action being challenged" are not "the type of error that requires a remand." They did not address the different question, which petitioners seek to raise, of whether a remand would be appropriate based on a prediction about whether further proceedings to correct an identified error would yield a different result.

For example, in *Nevada* v. *Department of Energy*, 457 F.3d 78, 90-91 (2006), the D.C. Circuit held that the agency's failure to identify its preferred alternative by name in its final EIS was harmless because the public had sufficient information to comment on the various available alternatives (including the agency's preferred alternative) in the EIS, and because the agency subsequently identified its preferred alternative, permitting the public to comment on that alternative specifically. Thus, any failure by the agency did not undermine "NEPA's goal of ensuring that relevant information is available to those participating in agency decision-making" and did not affect the agency's final decision. *Ibid.* The other court of appeals decisions on which petitioners rely (Pet. 20-24) included similar circumstances. See *United States Telecom Ass'n* v. *FCC*, 400 F.3d 29, 40-42 (D.C. Cir. 2005) (agency's failure to label rule-making process as notice-and-comment did not require remand because any error did not affect the outcome of the agency's decision); *Save Our Heritage, Inc.* v. *FAA*, 269 F.3d 49, 61-62 (1st Cir. 2001) (NEPA violation was not prejudicial because agency did analyze environmen-

tal effects of proposed action); *Dantran, Inc.* v. *United States Dep't of Labor*, 171 F.3d 58, 73-74 (1st Cir. 1999) (declining to remand because administrative record established that error in agency decision-making did not affect outcome); *Friends of the Boundary Waters Wilderness* v. *Dombeck*, 164 F.3d 1115, 1129-1130 (8th Cir. 1999) (reliance on some data that may have been flawed did not violate NEPA because there was not a significant chance that any error affected agency's decision); *Glisson* v. *United States Forest Serv.* 138 F.3d 1181, 1183 (7th Cir.) (possible oversight in Environmental Assessment did not require reversal because agency's decision would have been the same without the possible oversight), cert. denied, 525 U.S. 1022 (1998); *Sierra Club* v. *Slater*, 120 F.3d 623, 637 (6th Cir. 1997) (technical failure that had no bearing on ultimate decision not a basis for reversal); *Fisher* v. *Bowen*, 869 F.2d 1055, 1057 (7th Cir. 1989) (ALJ's decision was supported by substantial evidence notwithstanding decision's "vulnerab[ilities]"); *Illinois Commerce Comm'n* v. *ICC*, 848 F.2d 1246, 1257-1258 (D.C. Cir. 1988) (agency's failure to prepare Environmental Assessment was not prejudicial because agency did consider environmental consequences during rule-making and would be required to do so in future individualized proceedings), cert. denied, 488 U.S. 1004 (1989); *NLRB* v. *American Geri-Care, Inc.*, 697 F.2d 56, 64 (2d Cir. 1982) (remand required only if "there is a significant chance that but for the error, the agency might have reached a different result"), cert. denied, 461 U.S. 906 (1983).

Petitioners do not identify any decision holding that a reviewing court is *prohibited* from remanding for further proceedings upon finding error in an agency decision in circumstances such as those present here.

Nor does anything in the court of appeals' discussion of respondents' Management Act claims conflict with any other court of appeals' application of the APA's prejudicial-error rule. Accordingly, further review of the court of appeals' fact-specific application of the prejudicial-error rule is not warranted.

2. For the same reasons, the court of appeals' application of the prejudicial-error rule to respondents' NEPA claims does not warrant review by this Court. In holding that BLM's EIS violated NEPA with respect to the purpose-and-need statement and the range-of-alternatives analysis, the court of appeals indicated that it could not determine whether the identified errors affected the outcome of the agency's final decision. The court concluded that BLM's definition of the project's purpose—a definition the court viewed as overly narrow—"will necessarily affect the range of alternatives considered." Pet. App. 27; see *id.* at 28 ("Such a narrowly drawn [purpose-and-need] statement necessarily and unreasonably constrains the possible range of alternatives."). Although the government disagrees with the court's conclusions that the purpose-and-need statement was too narrow, and that the agency failed to consider an appropriately broad range of alternatives, the court's decision to remand for further proceedings after drawing such conclusions does not conflict with other courts' applications of the prejudicial-error doctrine.[4]

The same is true with respect to the eutrophication issue. The court indicated, based on the manner in which the EIS discussed eutrophication (*i.e.*, dispersed throughout the document rather than collected in one

---

[4] As noted above, petitioners' question presented does not challenge the merits of the court of appeals' finding of a NEPA violation.

section), that it was not clear whether the identified error affected the outcome of the agency's final decision. The court concluded that BLM's "EIS contains no specific discussion of eutrophication" and that the discussion that it did provide was "neither full nor fair with respect to atmospheric eutrophication." Pet. App. 31-32. Again, although the government takes issue with the court's conclusion regarding the adequacy of the EIS, the court's determination that remand was appropriate in light of that conclusion does not conflict with other courts' application of the prejudicial-error rule.[5] Thus, the court of appeals' fact-bound application of the APA's prejudicial-error rule does not warrant further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
TAMARA N. ROUNTREE
Attorney

FEBRUARY 2011

---

[5] Moreover, petitioners failed to present a prejudicial-error argument to the court of appeals with regard to the NEPA issues. This Court "generally declines to review issues not pressed or passed upon by the lower courts." Eugene Gressman et al., *Supreme Court Practice* § 6.26(b), at 465 (9th ed. 2007) (emphasis omitted); see also *United States* v. *Williams*, 504 U.S. 36, 41 (1992).